UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

CENTRAL RADIO COMPANY, INC.,
ROBERT WILSON, and
KELLY DICKINSON,

Plaintiffs,

v. **Civil No. 2:12cv247**

CITY OF NORFOLK, VIRGINIA,

Defendant.

ORDER

Pending before this Court is the final aspect of Plaintiffs' Emergency Motion for a Temporary Restraining Order and/or Preliminary Injunction. ECF No. 3. On May 4, 2012, this Court denied the portion of that motion that sought a temporary restraining order. Subsequently, the parties filed briefing addressing whether the Court should issue extraordinary relief in the form of a preliminary injunction. An evidentiary hearing on this matter was held on June 28, 2012. After considering the arguments presented at that hearing, as well as the pleadings and evidence submitted and applicable case law, the Court is compelled to deny Plaintiffs' request for a preliminary injunction.

I. BACKGROUND

A. Factual and Procedural History

Plaintiff Central Radio Company ("Central Radio") describes itself as a thriving business in Norfolk, and claims a seventy-eight year history of building and maintaining radio and radar systems. Clients include the United States Navy, several federal law enforcement agencies, Norfolk Southern

Railroad, and Norfolk city schools. Central Radio has been located at 39th Street and Hampton Boulevard in Norfolk for fifty years. Co-Plaintiff Robert Wilson is Central Radio's Senior Vice President and a controlling stockholder. Co-Plaintiff Kelly Dickinson is Central Radio's Vice President of Production and Procurement.

In April 2010, the Norfolk Redevelopment and Housing Authority ("NRHA") initiated eminent domain proceedings against Central Radio as part of its "Hampton Boulevard Redevelopment Project." The NRHA is a chartered political subdivision of the State of Virginia, created by the City of Norfolk and run by a seven-member board appointed by Norfolk City Council.

Plaintiffs assert that since 1999, the NRHA has used eminent domain procedures to force the sale of almost 200 structures in the area, claiming that some properties were blighted. The parties stipulate that Central Radio's property itself is not blighted.

Plaintiffs believe that the NRHA intends to turn Central Radio's land and other parcels in the surrounding area over to Old Dominion University. Old Dominion University has planned to use some of the land for its "University Village," consisting of housing and retail shops.

Central Radio and four other property owners opposed some of these condemnations in legal actions. In part, they contended that the condemnations violate a recently enacted Virginia law that limits the use of eminent domain procedures to properties that are blighted.

In February 2012, a state trial court rejected Plaintiffs' arguments and ruled that the NRHA could condemn the properties of Central Radio and the other property owners. Plaintiffs report that the state trial court action will proceed to a compensation trial, which will likely take place within six months. After that trial, Central Radio and the other property owners intend to appeal the trial court's rulings.

Meanwhile, on March 23, 2012, Central Radio unfurled a 375-square-foot banner on an exterior wall of a building on its property. The banner contains Central Radio's corporate logo, an image of the American flag, and the following message: "50 years on this street. 78 years in Norfolk. Over 100 Employees." Pls. Ex. A. Below this are the words "Threatened by Eminent Domain!" and a red circle with a slash around the phrase "Eminent Domain Abuse." *Id.*

On April 5, 2012, city inspectors issued two notices of violation. These notices required Plaintiffs to obtain a permit, or remove the banner, or to reduce the size of the banner to sixty square feet.

Central Radio was advised of its right to appeal the violation notices, and that any appeal must be filed within thirty days. Both citations warned that the failure to appeal would render the decision "final and unappealable."

Plaintiffs allowed the deadline to expire without exercising their appeal rights. Instead, they sued and now ask this Court to enjoin the city from enforcing the Sign Code.

This Court's Order of May 4, 2012, declined to issue a temporary restraining order as requested by Plaintiffs, partly because at the time, Plaintiffs could have obtained a statutory stay against enforcement by advancing an administrative appeal of the violation notices by May 7.

B. The Sign Code

Norfolk's Sign Code covers "any sign within the city which is visible from any street, sidewalk or public or private common open space." Norfolk Code app. A § 16-2 (2012). Unless explicitly exempted, those who wish to display a sign must apply for, and receive, a sign certificate from the zoning administrator. *Id.* § 16-5.1.

Central Radio is located in a light industrial zoning district known as I-1. The Sign Code permits property owners in I-1 to post temporary signs in various categories, including noncommercial event signs, political signs, real estate signs, construction signs, new project development signs, and signs advertising commercial sales and new businesses. *Id.* § 16-8.3(a).

The largest sign allowable under this subsection is a temporary sign for commercial sales and new businesses, limited to sixty square feet. *Id.*

The Code also allows properties in I-1 to display a sign with dimensions of one square foot per linear foot of building frontage facing a public street. *Id.* § 16-8.3(c). Plaintiffs contend that the scope of this provision is unclear. Previously, Central Radio erected one business sign on the side of the building that displays the banner at issue. That sign is twenty-five square feet.

Exempted from Code restrictions are government flags and emblems, murals, and festival banners. *Id.* § 16-5.2(a). Signs exempted from paying registration fees include certain off-premises directional signs, institutional bulletin boards, memorial plaques, and historical markers. *Id.*

Violations of the Code are considered misdemeanors and are punishable by a fine of up to $1,000 per day. *Id.* §§ 16-10.2(b), 23-4.1.

Norfolk's "purpose statement" for the Code reads as follows:

> The purpose of this chapter is to promote and protect the public health, safety and welfare of the city; enhance opportunities for visual communication; preserve property values; create a more attractive economic and business climate within the office, commercial, and industrial areas of the city; enhance and protect the physical appearance of all areas of the city; and reduce the distractions, obstructions and hazards to pedestrian and auto traffic caused by the excessive number, size or height, inappropriate types of illumination, indiscriminate placement or unsafe construction of signs.

Id. § 16-1.

C. Plaintiffs' Claims

As noted, in response to receiving the two citations on April 5, 2012, Plaintiffs waived their administrative appeal rights and filed this lawsuit. Plaintiffs argue that the city's decision to require them to remove their sign or reduce its size by a purported eighty-three percent infringes rights granted to them under the First Amendment to the United States Constitution. The Complaint advanced three specific counts initially:

(1) The size limits applicable to signs in the I-1 zoning district are too small to allow adequate expression. ECF No. 1, paras. 66-77 (Count One);

(2) The city imposes different limitations on different signs based on the message conveyed by each sign. *Id.* at paras.78-82 (Count Two), and

(3) The city requires a permit before a sign is erected but places no time limit on how long the permit consideration can take. *Id.* at paras. 83-87 (Count Three).

In summarizing these charges subsequently, Plaintiffs allege that Norfolk's Sign Code amounts to an unconstitutional content-based restriction and prior restraint on speech. In sum, Plaintiffs argue that they are entitled to a preliminary injunction because the Sign Code at issue contradicts Supreme Court and the Fourth Circuit precedents. Plaintiffs contend that these precedents establish that the government cannot prevent individuals from using their own property as an effective means of communicating their views to the public, and assert that an injunction would protect Plaintiffs from alleged irreparable harm while causing no harm to others.

II. STANDARDS OF LAW

"[S]peech on public issues occupies the 'highest rung of the heirarchy of First Amendment values,' and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)).

At the same time, however, "municipalities have a weighty, essentially esthetic interest in proscribing intrusive and unpleasant formats for expression." *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 806 (1984).

A. First Amendment

In determining whether a restriction on speech is permissible, courts distinguish between content-based regulations "that suppress, disadvantage, or impose differential burdens upon speech because of its content," and content-neutral regulations that merely "impose burdens on speech without reference to the ideas or views expressed." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642-43 (4th Cir. 1994).

"[T]he First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals." *Id.* at 641. Accordingly, a content-based restriction is permissible only if it is "1) narrowly tailored to 2) promote a compelling government interest." *PSINet, Inc. v. Chapman*, 362 F.3d 227, 233 (4th Cir. 2004).

In contrast, a "content-neutral regulation of the time, place, and manner of speech is generally valid if it furthers a substantial government interest, is narrowly tailored to further that interest, and leaves open ample alternative channels of communication." *Am. Legion Post 7 v. City of Durham*, 239 F.3d 601, 609 (4th Cir. 2001).

"The principal inquiry in determining content neutrality in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

The purpose of a regulation is not dispositive. *See Turner Broad. Sys., Inc.*, 512 U.S. at 642–43. Instead, the Supreme Court has held that a regulation is content-neutral if:

> (1) the regulation is not a regulation of speech, but rather a regulation of the places where some speech may occur; (2) the regulation was not adopted because of disagreement with the message [the speech] conveys; or (3) the government's interests in the regulation are unrelated to the content of the [affected] speech.

Covenant Media of S.C., LLC v. City of N. Charleston, 493 F.3d 421, 432 (4th Cir. 2007) (alterations in original) (quoting *Hill v. Colorado*, 530 U.S. 703, 719–20 (2000)) (internal quotation marks omitted).

There are two methods by which the constitutionality of a statute can be analyzed: either via a facial challenge or via an as-applied challenge. *See, e.g., Educ. Media Co. at Va. Tech, Inc. v. Swecker*, 602 F.3d 583, 588 (4th Cir. 2010).

A facial challenge examines the constitutionality of the statute itself, without regard to the plaintiff's particular circumstances. *See Wag More Dogs, Ltd. Liability Corp. v. Cozart*, 680 F.3d 359, 365-69 (4th Cir. 2012). In contrast, an as-applied challenge argues that the statute cannot constitutionally be applied to the plaintiff. *See id.* at 369.

B. Preliminary Injunctions

Plaintiffs request a preliminary injunction. The Supreme Court has characterized injunctive relief as "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). "A plaintiff seeking a preliminary injunction must establish that he [or she] is likely to succeed on the merits, that he [or she] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his [or her] favor, and that an injunction is in the public interest." *Id.*

at 20. If the plaintiff cannot show all of these elements, the request for an injunction must be denied. *See id.* at 22.

III. DISCUSSION

Analyzing the likelihood of success is crucial in determining whether this Court should grant injunctive relief, and is an appropriate place to begin this analysis. *See Giovani Carandola, LTD v. Bason*, 303 F.3d 507, 511 (4th Cir. 2002).

The primary question presented is whether Plaintiffs are likely to succeed in establishing that Norfolk's efforts to enforce the Sign Code run afoul of the protections provided by the First Amendment. Plaintiffs raise both facial and as-applied challenges to the Sign Code.

A. Facial Challenge

Plaintiffs argue that the Sign Code is a content-based regulation that violates the First Amendment on its face. In evaluating the likelihood of this claim succeeding, the Court must first "'examine the plain terms of the regulation to see whether, on its face, the regulation confers benefits or imposes burdens based upon the content of the speech it regulates.'" *Satellite Broad. & Commc'ns Ass'n v. FCC*, 275 F.3d 337, 353-54 (4th Cir. 2001) (quoting *Chesapeake & Potomac Tel. Co. of Va. v. United States*, 42 F.3d 181, 193 (4th Cir. 1994). The court must then "ask whether the regulation's manifest purpose is to regulate speech because of the message it conveys." *Id.* (quoting *Chesapeake & Potomac Tel. Co. of Va.*, 42 F.3d at 193 (internal quotation marks omitted)).

Plaintiffs claim, in part, that the Code's industrial district temporary sign regulation is an impermissible content-based regulation. The Court concludes that Plaintiffs are unlikely to succeed in establishing that they have standing to challenge this provision of the Sign Code. "Although there is broad 'latitude given facial challenges in the First Amendment context,' a plaintiff must establish

that he [or she] has standing to challenge each provision of an ordinance by showing that he [or she] was injured by application of those provisions." *Covenant Media of South Carolina, LLC*, 493 F.3d at 429-30 (citations omitted) (quoting *Gonzales v. Carhart*, 550 U.S. 124, 167 (2007)).

Defendant's citations regarding Plaintiffs' banner were not premised upon the Sign Code provision regarding temporary signs. That provision sets differing size restrictions for different categories of signs, ranging from eight square feet for noncommercial events to sixty square feet for commercial sale events or grand openings. Norfolk Code app. A § 16-8.3(a). Although Plaintiffs were cited for displaying a sign that is larger than sixty square feet, ECF No. 1-5, there is no allegation – or reasonable possibility – that their banner was misconstrued as pertaining to a "commercial sale event" or a "grand opening."

Moreover, Plaintiffs are unlikely to succeed in establishing that their banner was intended as a temporary sign, or that Defendant attempted to regulate the banner by applying the temporary sign provision from its Sign Code. Accordingly, Plaintiffs likely lack standing to explore the constitutionality of, or otherwise raise a viable facial challenge to, the Code's temporary sign provisions.

Plaintiffs also claim that Section 16-2.5(a) of the Sign Code should be construed as rendering the Code's restrictions content-based. This section exempts nine types of signs (as well as the routine maintenance of signs) from the requirements of the Sign Code. Norfolk Code app. A § 16-5.2(a). Plaintiffs rely upon *Neighborhood Enterprises, Inc. v. City of St. Louis*, in which the Eighth Circuit held that a sign code was content-based because the plaintiffs' sign "would not be subject to regulation if it were a '[n]ational, state, religious, fraternal, professional and civic symbol [ ] or crest[ ], or on site ground based measure display device used to show time and subject matter

of religious services.'" 644 F.3d 728, 736-37 (8th Cir. 2011) (alterations in original) (quoting St. Louis City Revised Code § 26.68.020(17)(d)).

However, the facts presented here are more closely aligned with those described in *Wag More Dogs*, in which the challenged sign ordinance "impose[d] size requirements on 'business signs' that [did] not similarly apply to noncommercial signs, and . . . exempt[ed] fifteen types of signs from its coverage." 680 F.3d at 368.

Although such provisions required city officials to "superficially evaluate a sign's content to determine the extent of applicable restrictions," the Fourth Circuit held that the sign code was not content-based because its "objectives, which [sought] to address problems caused by signs wholly apart from any message conveyed, mitigate[d] any concern that the kind of cursory examination brought about by looking generally at what type of message a sign carries to determine where it can be located render[ed] the regulation content based." *Id.* at 368-69 (alterations provided) (quoting *Covenant Media of S.C., LLC*, 493 F.3d at 434-35) (internal quotation marks omitted).

Plaintiffs are unlikely to succeed in establishing that the Sign Code at issue here is anything but a content-neutral regulation of time, place and manner. The Code is intended to "protect the public health, safety and welfare of the city; enhance opportunities for visual communication; preserve property values; create a more attractive . . . business climate . . . ; . . . protect the physical appearance . . . of the city; and reduce the . . . hazards to . . . traffic caused by . . . [misuse] of signs." Norfolk Code app. A § 16-1. This Code, much like the one in *Wag More Dogs*, was designed to "address problems caused by signs wholly apart from any message conveyed," and therefore is subject to evaluation under intermediate, rather than strict, scrutiny.

Under intermediate scrutiny, a "content-neutral regulation of the time, place, and manner of speech is generally valid if it furthers a substantial government interest, is narrowly tailored to further that interest, and leaves open ample alternative channels of communication." *Am. Legion Post 7*, 239 F.3d at 609. The Fourth Circuit has held that the intent to "promote traffic safety" and the intent to "enhance [local] aesthetics" are both substantial government interests. *Wag More Dogs, Ltd. Liability Corp.*, 680 F.3d at 369. In *Wag More Dogs*, the Fourth Circuit held that a size restriction similar to the one presented here was narrowly tailored and left open ample alternative channels for communication. *Id.* (upholding a regulation that limited commercial signs to the greater of either sixty square feet or one square foot per foot of frontage).

After carefully considering all of the arguments presented by Plaintiffs (those addressed above as well as others), the applicable authorities, and the facts at issue in this case, this Court is compelled to conclude that Plaintiffs have failed to establish that they are likely to prevail on the merits of a facial challenge. The Court turns next to Plaintiffs' as-applied challenge.

B. As-applied Challenge

Plaintiffs also claim that the Norfolk Sign Code is unconstitutional as it is applied to the Central Radio banner. "'Because the degree of protection afforded by the First Amendment depends on whether the activity sought to be regulated constitutes commercial or non-commercial speech, we must first determine the proper classification of the [banner] at issue here.'" *Wag More Dogs, Ltd. Liability Corp.*, 680 F.3d at 369 (alteration provided) (quoting *Bolger v. Youngs Prods. Corp.*, 463 U.S. 60, 65 (1983)). Accordingly, the Court must determine whether the Central Radio banner should be construed as commercial or non-commercial speech.

The fact that advertising is done in connection with a public issue does not render that advertising non-commercial. *Bd. of Trustees of State University of New York v. Fox*, 492 U.S. 469, 474-75 (1989) (holding that inserting home economics lessons into presentations intended to sell food containers "no more converted [those] presentations into educational speech, than opening sales presentations with a prayer or a Pledge of Allegiance would convert them into religious or political speech").

Instead, speech is construed as commercial speech if it constitutes advertising, references a specific product, or is motivated by economic concerns. *Wag More Dogs, Ltd. Liability Corp.*, 680 F.3d at 370. When speech contains commercial aspects intertwined with political elements, "the commercial or noncommercial character of the speech is determined by 'the nature of the speech taken as a whole.'" *Adventure Commc'ns, Inc. v. Ky. Registry of Election Fin.*, 191 F.3d 429, 441 (4th Cir. 1999) (quoting *Riley v. Nat'l Fed'n of Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988)). The ultimate question is whether the speech, in context, "proposes a commercial transaction." *Id.*

This Court concludes that Central Radio's banner is non-commercial speech. Although the banner features Central Radio's corporate logo, that inclusion is inextricably intertwined with the banner's non-commercial speech. The intent of including the logo appears primarily to be more of a means for identifying the sign's "speaker" than to attract new customers. The banner's message about the company's longevity and employment was presented to bolster Plaintiffs' assertions that the use of eminent domain procedures against Plaintiffs is unjust. The banner was displayed to express a protest against governmental action. The Court concludes that the Central Radio sign is likely to be construed as a non-commercial political sign.

Content-neutral restrictions upon non-commercial speech are subject to intermediate scrutiny. *See Hill*, 530 U.S. at 725. As stated earlier, a regulation that concerns the time, place, and manner of speech is generally valid if it further a substantial government interest, is narrowly tailored to further that interest, and leaves open ample alterative channels of communication.

There is no dispute that the city of Norfolk has a substantial governmental interest in preserving aesthetics and promoting traffic safety. Therefore, to obtain injunctive relief, Plaintiffs must show a likelihood of success in their claim that the Sign Code is insufficiently tailored or fails to leave open alternative channels for political speech.

The details of a regulation – such as specific sizing restrictions or a cap on the number of signs permitted – are a legislative matter and are outside the scope of a judicial evaluation regarding whether the regulation is narrowly tailored. *Arlington Cty. Republican Comm. v. Arlington Cty.*, 983 F.2d 587, 594 ("[W]e cannot question whether narrowly tailoring the statute requires allowing more than two signs. Such a limit is a legislative decision, not reviewable by the courts.").

Instead, this Court must examine whether Plaintiffs are likely to succeed in establishing that Defendant's restrictions are unnecessary. Plaintiffs have failed to show – and are unlikely to succeed in showing – that the regulations at issue here should be deemed unnecessary in efforts to preserve urban aesthetics and promote traffic safety.

As noted, the Sign Code must also leave open ample alternative channels for political speech. *See Taxpayers for Vincent*, 466 U.S. at 812 ("while the First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places, a restriction on expressive activity may be invalid if the remaining modes of communication are inadequate.").

Plaintiffs contend the applicable regulations are similar to the two-sign limit addressed in *Arlington County Republican Committee*, which the Fourth Circuit construed as failing to provide sufficient alternative channels to a homeowner for expressing political views on the homeowner's property. *Arlington Cty. Republican Comm.*, 983 F.2d at 594-95. However, Plaintiffs have shown no likelihood of success in establishing that the alternative channels of communication available here would be inadequate. For one example, Plaintiffs are free to display smaller signs bearing similar messages conveying their view that they have been treated unjustly by Defendant. The Court is compelled to conclude that Plaintiffs have failed to establish that the extraordinary relief of imposing an injunction is warranted.

IV. CONCLUSION

There is no question that Plaintiffs are respected, long-standing neighbors in Norfolk who have contributed in myriad ways to their community. They are profoundly frustrated by the imposition of governmental plans to which they strenuously and sincerely object. They have participated in legitimate litigation challenging these plans, and they intend to continue to do so. In concert with this opposition, they also unfurled a large banner bearing speech that protests the governmental plans in a striking, public manner.

There is also no dispute that this banner appears to conflict with explicit provisions of the city's Sign Code. City officials cited Plaintiffs as a result of these apparent conflicts. Instead of appealing the citations administratively, or otherwise negotiating a resolution regarding the apparent conflicts with the Code, Plaintiffs opted to seek extraordinary federal judicial relief.

Such relief can be ordered only upon clear showings that an injunction is warranted. Although speech on public issues, such as the speech at issue here, is afforded special protection, this

Court is compelled to conclude that Plaintiffs are unable to meet the demanding standard required before receiving the extraordinary relief of an injunction.

"Courts have long recognized that the First Amendment does not guarantee the right to express oneself at all times and places and in any manner that a person may wish." *Wag More Dogs, LLC, v. Artman*, 795 F. Supp. 2d 377, 384 (E.D. Va. 2011) (citing *Heffron v. Int'l Soc'y for Krishona Consciousness, Inc.*, 452 U.S. 640, 647 (1981)). Regardless of any possible merits to Plaintiffs' opposition to the city's use of eminent domain, Plaintiffs have failed to show a likelihood of success in their quest to establish that the provisions of Norfolk's Sign Code that led to the citations against them are unconstitutional. Accordingly, Plaintiffs' request for the extraordinary remedy of a preliminary injunction must be **DENIED.**

The Clerk is **DIRECTED** to forward copies of this Order to all counsel of record. Counsel are **ORDERED** to confer and to file a Joint Status Report within thirty days of the date of this Order identifying a briefing proposal for the final resolution of this matter.

IT IS SO ORDERED.

July 27th, 2012
Norfolk, Virginia

Arenda L. Wright Allen
ARENDA L. WRIGHT ALLEN
UNITED STATES DISTRICT JUDGE